

IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates Court]

CRIMINAL APPEAL NO.AAU0094 of 2019
[In the Magistrates Court at Ba Case No. HAC 172 of 2015]

BETWEEN : **SITIVENI WAQA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. S. Waqainabete for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **30 November 2021**

Date of Ruling : **01 December 2021**

RULING

[1] The appellant had been charged along with another in the Magistrates Court at Ba on one count of aggravated robbery contrary to section 311(1)(a) and (b) read with section 46 of the Crimes Act, 2009 and one count of attempted rape contrary to section 208 of the Crimes Act, 2009 committed on 12 May 2015 at Namosau, Ba in the Western Division.

[2] The information read as follows:

'First Count

Statement of Offence

Aggravated Robbery: *Contrary to Section 311 (1) (a) and (b) and Section 46 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

*Jone Rayawa and Sitiveni Waqa, on the 12th day of May 2015 in the company of each other at Namosau, Ba in the Western Division stole the following items from **Veena Padarath** which were in her possession at the time:*

- i. Cash worth \$130;*
- ii. 1 x Nokia mobile phone valued at approximately \$69;*
- iii. 1 x Nokia mobile phone value at approximately \$178;*
- iv. 1 pair Oakley brand sunglasses valued at approximately \$60;*
- v. 1 pair Gold ear-rings valued at approximately \$150;*
- vi. 1 x HP brand laptop valued at approximately \$2,440 owned by **Narendra Padarath**;*
- vii. 1 v Philips brand electric shaver valued at approximately \$100 owned by **Niven Padarath**.*

*All to the total value of \$3, 127 and at the time of stealing the said items **Veena Padarath** was assaulted and threatened with a cane knife.*

Second Count

Statement of Offence

Attempted Rape: *Contrary to Section 208 of the Crimes Act No. 44 of 2009.*

Particulars of Offence

*Sitiveni Waqa, on the 12th day of May 2015 at Namosau, Ba in the Western Division, attempted to have carnal knowledge of **Veena Padarath** without her consent.'*

[3] After full trial, the learned Magistrate had found the appellant guilty of both counts and sentenced him on 01 July 2019 to 06 years and 06 months of imprisonment with a non-parole period of 05 years and 06 months for aggravated robbery and 04 years of imprisonment on attempted rape; both sentences to run concurrently.

[4] The appellant's appeals against conviction and sentence are timely. However, he had later submitted an application to abandon the sentence appeal in Form 3 (18 November 2020). The Legal Aid Commission had filed amended grounds of appeal and written submissions only against conviction on 10 February 2021. The state had filed written submissions on 12 November 2021.

[5] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against sentence is ‘reasonable prospect of success’ [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The Magistrate had summarized the facts in the sentencing order as follows:

2. According to the evidence accepted by the Court, you and your accomplice planned to steal and therefore came to the victim’s house at Namosau, Ba. The victim Veena Padarath was alone in her home on 12/5/15 at around midday. You and accomplice then came and you knocked at the door of victims home. When the victim opened the door you then forcefully pushed the door and came into her house. The victim than ran towards the bulk store and yelled as she was afraid. You then came and held her top and she fell on the table at the bulk store. You then pressed her mouth so hard and she started bleeding from her nose and gums. You also held a cane knife close to her neck and told her that you wanted money from Ba Hotel and that you have information that they have that money. The victim then told you that there’s no money. You then took her into a bedroom and looked underneath the bed and found nothing. Then you taped her mouth and nose with a duct tape. At the time your accomplice came into the house and was present. Your accomplice was then holding the victims hand and back and informed you that she couldn’t breathe. Your accomplice then removed the tape from the victim so that she could breathe. At that time you then searched the house whilst your accomplice guarded the victim. When you returned, you then took the victim into one of the bedrooms. Whilst inside the bedroom your accomplice took the stolen items and left.

Whilst you were alone with the victim inside the bedroom, you then pushed her on the bed and told her that there’s money and if she doesn’t give the money you will rape her. You then got angry and put knife on her neck. The victim was seated on the bed and you pushed her and also threatened to kill her. You then told the victim to put her pants down. She

was wearing ¾ pants and a top. She was seated and her pants were pulled down to her knee. You then removed your pants and being half naked and the victim could see your penis. The victim's pants were down to her knees and her knickers half way at mid-thigh. You then came on top of her. Your face was very close to her face and your legs on top and between her thighs. You were lying on top of her. Your legs touched her legs and your private part touched her leg. The victim begged you not to do it and closed her eyes. Then after a few seconds you stood up and told the victim to pull up her pants and you also pulled up your pants. After some time you then left the victims residence.

The matter was then reported to police and relevant enquires were conducted. The victim was also taken for medical examination and her medical report shows the injuries she sustained from the incident.'

- [7] The grounds of appeal against conviction urged on behalf of the appellant are as follows:

Ground 1

THAT the Learned Magistrate may have fallen into an error in fact and law to unreasonably convict the appellant without independently assessing and considering with caution the totality of the evidence of Jone Rayawa [PW4].

Ground 2

THAT the Learned Magistrate may have fallen into an error in fact and law to unreasonably convict the appellant without independently assessing and considering with caution the totality of the evidence of recent possession, thereby causing a substantial miscarriage of justice.

Ground 3

THAT the Learned Magistrate may have fallen into an error in fact and law to unreasonably convict the appellant without independently assessing and considering with caution the totality of the evidence regarding identification.'

01st ground of appeal

- [8] The gist of the appellant's argument is that the Magistrate had not independently assessed and considered with caution the totality of the evidence of Jone Rayawa (PW4). PW4 was the co-accused who was charged only with aggravated robbery. He pleaded guilty and sentenced to 07 years of imprisonment. The prosecution had later called him as a witness. Thus, PW4 was clearly an accomplice.

- [9] The Magistrate had been mindful of the status of PW4 as seen from paragraph 8 of the judgment and cautioned himself of the dangers in accepting PW's evidence to convict the appellant.
- [10] Generally speaking, it is the duty of the judge to warn the assessors that it is dangerous to convict upon the evidence of an accomplice unless corroborated; this rule of practice has now acquired the force of rule of law; failure to do so would result in the conviction being quashed unless the proviso to section 23(1) of the Court of Appeal Act is applied (vide Ali v State [2013] FJCA 41; AAU105 of 2008 (30 May 2013)). However, whether a warning is given and the terms of the warning are matters for judicial discretion (vide Laing v The Queen [2013] UKPC 14 at para 8). It is necessary to examine the particular circumstances of the case before reaching a decision as to the terms of the warning (vide Stone [2015] EWCA Crim 105).
- [11] The object of sentencing in advance a co-accused who is to give evidence for the prosecution is that there should be no suggestion that the accomplice is under any inducement to give evidence in expectation of a shorter sentence [vide R v Stone 54 Cr App. R 364, CA].
- [12] In this case PW4 had pleaded guilty and sentenced before he was summoned to give evidence as a prosecution witness. Therefore, he had no incentive or was under no obligation to the prosecution to falsely implicate the appellant in order to extricate himself from the charges and had no expectation of a lesser sentence. In any event, there is ample corroboration of PW4's evidence by the evidence of the complainant who had identified the appellant at the scene as he had spent about 02 hours there. Thus, no accomplice warning was really required in this case though out of abundance of caution the Magistrate had cautioned himself.
- [13] Thus, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

- [14] The appellant's complaint under this ground of appeal is based on 'recent possession' evidence in that the Magistrate is supposed to have failed to independently assessed and considered with caution the totality of the evidence of recent possession thereby causing a substantial miscarriage of justice.
- [15] It is common ground that stolen articles were found in the possession of PW4 and not that of the appellant. The state submits that the prosecution did not at all rely on recent possession evidence to establish the identity of the appellant which was amply proved by the evidence of the complainant and PW4. The state counsel further submits that nowhere in the judgment has the Magistrate considered recent possession evidence in relation to the identity of the appellant.
- [16] Therefore, principles relating to recent possession evidence extensively discussed in **Batimudramudra v State** [2021] FJCA 96; AAU113 of 2015 (27 May 2021) do not come into play.
- [17] This ground of appeal has no merits.

03rd ground of appeal

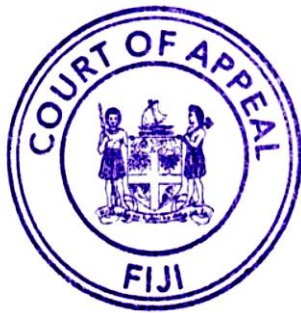
- [18] The appellant contests the identification of the appellant in that it is alleged that the Magistrate had unreasonably convicted the appellant without independently assessing and considering with caution the totality of the evidence regarding identification.
- [19] The appellant's identification was spoken to by his co-accused PW4. The complainant had seen the appellant for 02 hours at the crime scene and for about 10 minutes before when the appellant was seen speaking to her husband a week prior to the incident (see paragraph 16 of the judgment). Therefore, it was not a case of first time dock identification by the complainant. In any event, PW4's evidence dispelled any doubt on the identity of the appellant.

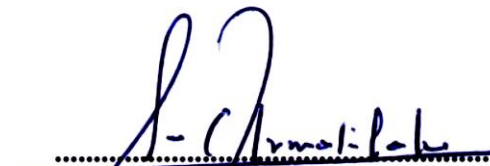
[20] The Magistrate had fully considered the issue of disputed identification having regard to **Turnbull principles** - [1977] QB 224 - at paragraph 20 of the judgment. He had also examined the circumstances in which the visual identification was made by the complainant carefully as highlighted in **Wainiqolo v The State** [2006] FJCA 70; AAU0027 of 2006 (24 November 2006).

[21] Therefore, this ground of appeal has no reasonable prospect in appeal.

Order

1. Leave to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL